Nos. 58 and 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

A. L. MECHLING BARGE LINES, INC., et al.,
Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al.

On Appeal From The United States District Court For The Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE THE NEW YORK CENTRAL RAILROAD COMPANY

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McCORMICK AND HENDERSON, INC., CHICAGO

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I.

OPINION BELOW.

These appeals are from a final judgment entered by a three-judge district court, reported at 209 F.Supp. 744, which dismissed a complaint seeking to set aside and enjoin Fourth Section Order No. 19346 of the Interstate Commerce Commission entered June 8, 1960, after hearing on the railroads' Fourth Section Application No. 33955, in *Corn and Corn Products, Illinois to Official Territory*, 310 I.C.C. 437.

II.

STATUTES INVOLVED.

This appeal involves the National Transportation Policy, preceding 49 U.S.C. §1, and Sections 1(5), 3(1), 3(4), 4(1), 13(1), 15(1), 15(7), and 17(3) of the Interstate Commerce Act; 49 U.S.C. 1(5), 3(1), 3(4), 4(1), 13(1), 15(1), 15(7), and 17(3). The text of these provisions is set forth in our Appendix hereto.

III.

STATEMENT.

A. Background of the Case.

Appellee, The New York Central Railroad Company, operates a line of railroad known as its Kankakee Belt which extends from South Bend, Indiana, through Kankakee, Illinois, and westward to Zearing, Illinois (R. 295). That portion of the line west of Kankakee to Moronts, Illinois, roughly parallels the Illinois River in Northern Illinois (R. 295, Exhibit 1).[1] It serves a rural territory and

[1] The exhibits identified in the record before the Commission are part of the record on appeal, but are not printed. By stipulation, they may be referred to. Wherever exhibits are referred to, they are the exhibits which were identified at the Commission hearing.

originates or terminates only an insignificant volume of traffic other than grain (R. 295). There is very little business available to the New York Central from the stations west of Kankakee except the bountiful surplus of corn which is grown there (R. 298). As found by the Commission, at one time that corn moved via all-rail routes to eastern destinations. (R. 13).

With the development of the Illinois Waterway in the mid 1930's, the corn was drawn away from the railroad to the River for barge movement and the West End of the Kankakee Belt was left almost barren of traffic and revenues. The situation was so serious that the New York Central considered abandonment of a portion of the line (R. 409).

The impact of the barge competition also was felt by the operators of small country elevators located along the West End of the Kankakee Belt. As to these country elevators, the Commission found that the rate advantage of the barge route relegated them "for the most part, to such operations as was necessary to process corn for retail locally (R. 27)."

That competitive situation which had virtually dried up the business of the railroad and elevators at the stations west of Kankakee caused the New York Central to establish rates that would meet the competition of the barge route (R. 296-297).

The barge rates to Chicago, Ill., from the Illinois River Ports[2] that were competitive with the rail stations on the Kankakee Belt, averaged 4.625 cents in December, 1956 (Exhibit 7, R. 12). Corn and corn products moved on the

[2] Lockport, Joliet, Morris, Seneca, Ottawa, LaSalle, Spring Valley, Hennepin, Henry and Lacon, Ill. (Exhibits 1 and 2).

combination of those barge rates plus the proportional[3], or reshipping rates, from Chicago to destination. The proportional rate on ex-barge corn from Chicago to the East is the same as the proportional rate on ex-rail corn to the same destinations. Inasmuch as the proportional rates from both Kankakee and Chicago to Eastern destinations are identical, the New York Central elected to meet that competition by establishing a proportional rate factor to Kankakee that would be competitive with the barge rates to Chicago. Thus the combination rates[4] via Kankakee would be competitive with the combination of the barge rate to Chicago and the proportional rail rates beyond (R. 299-300). No change was made in the proportional rates from either Kankakee or Chicago (R. 300).

The New York Central published a proportional rate of 5 cents per hundred pounds on corn and corn products when milled in transit, from its stations west of Kankakee to Kankakee over its direct line for application in connection with the existing proportional or reshipping rates beyond to eastern destinations (R. 11, 300). That proportional rate became effective December 15, 1956, without protest or objection (R. 12). It was increased to 5½ cents prior to the hearing and is now 6 cents[5] (R. 11). As the exhibits at the hearing were based on the 5½ cent rate, it is discussed at that level. The barge rate was increased to 4.825 cents in December 1957 (R. 299).

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[3] A proportional rate is one restricted so as to be applicable only on traffic having prior or subsequent transportation and is only a portion of the total transportation charge.

[4] A combination rate is a total rate composed of two or more rate factors. A flat rate is a rate of unrestricted application which is not dependent upon any prior or subsequent transportation.

[5] The 5½ cent rate to Kankakee and the reshipping rates from Kankakee and Chicago are proportional rates and have no independent application.

The following table showing the rates per hundred pounds to New York, N.Y. is illustrative of the rate situation at the time of the hearing (R. 303).

Via Barge Route		Via All-Rail Route	
Barge Rate to Chicago	4.825¢	Proportional Rate to Kankakee	5.5¢
Chicago Reshipping Rate	54.000¢	Kankakee Reshipping Rate	54.0¢
Combination Rate	58.825¢	Combination Rate	59.5¢

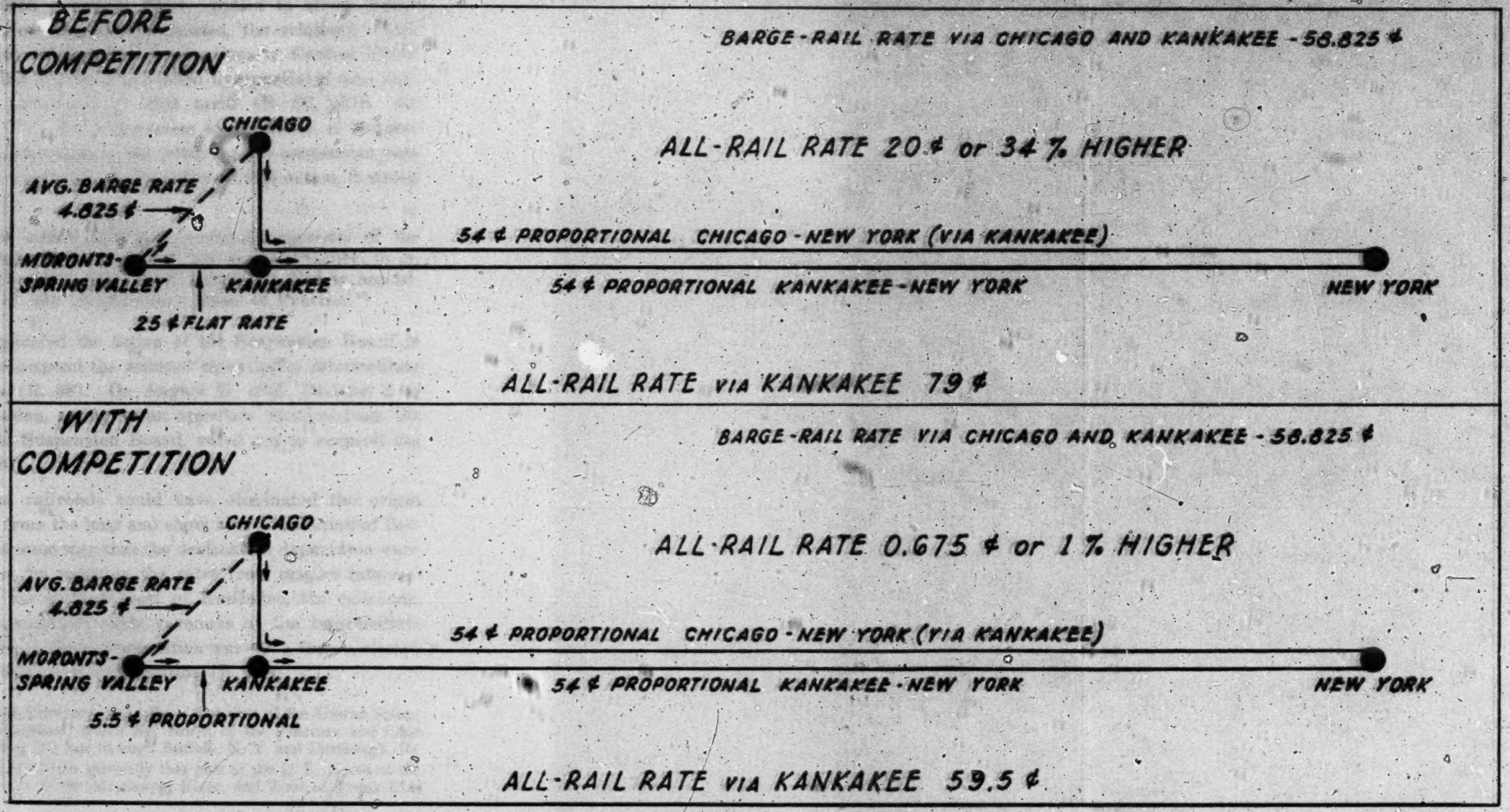
The diagram on the facing page illustrates the rate situation schematically.

No fourth section application was filed in connection with the publication of the proportional rate to Kankakee in November 1956. The rates via both Chicago and Kankakee are subject to identical provisions of previously issued fourth section orders. The barge-rail combination rates via Chicago to the east had for many years been less than the through rate from Chicago and intermediate origins in Indiana. It was New York Central's belief that since outstanding fourth section relief applied to the barge-rail route, it also applied to the all-rail route via Kankakee (R. 300). However, it was subsequently discovered that the rate publication caused unauthorized origin and destination departures from the requirement of section 4 of the Interstate Commerce Act which prohibits the charging of higher rates for a long haul than for a shorter included haul over the same line.

To eliminate the destination departures, *i.e.*, the charging of higher rates to intermediate destinations than to more distant destinations, the rates to the intermediate destinations were reduced by tariffs which were published to become effective August 29, 1957 (R. 300-301). Unlike the

COMPETITIVE SITUATION ALL-RAIL VS BARGE-RAIL RATES BEFORE AND AFTER RATE ADJUSTMENT

(ADJUSTED TO COMPENSATE FOR GENERAL RATE INCREASES OCCURRING PRIOR TO DATE OF HEARING) *



* WHILE THIS RAIL REDUCTION BECAME EFFECTIVE ON DECEMBER 15, 1956, ALL RATES, INCLUDING THE BARGE RATE, WERE INCREASED PRIOR TO THIS COMMISSION HEARING. FOR COMPARITIVE PURPOSES ALL RATES ARE STATED AT THE LEVEL THEY WOULD HAVE BEEN AT THE DATE OF THE HEARING (EXHIBIT 61, PP 3-5)

BARGE RATE - - -
RAIL RATE ———

December 1956 reduction which applied to all of Trunk Line[6] and New England territories, the relatively small reductions to intermediate destinations in Central Territory[7] (Exhibit 11) were protested by appellants who petitioned for suspension of that tariff (R. 96, 133). On August 26, 1957, the Commission by its Board of Suspension on consideration of the petitions for suspension concluded not to suspend. In its notice of that action, it stated that (R. 87):

> "This action does not constitute approval of the protested schedules. They may be made subject to investigation through formal complaint filed in accordance with the Commission's Rules of Practice."

Mechling appealed the action of the Suspension Board in declining to suspend the reduced rates to the intermediate destinations (R. 88). On August 27, 1957, Division 2 of the Commission, acting as an appellate division from the action of its Suspension Board, voted not to suspend the tariff (R. 90).

While the railroads could have eliminated the origin departures from the long and short haul prohibition of Section 4 in the same way that the destination departures were removed, *i.e.*, by reducing the rates from origins intermediate from the stations west of Kankakee, the railroads, desiring to maintain their revenues at the intermediate origins at which barge competition was not a factor, elected to file a fourth section application (R. 138).

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[6] Trunk Line Territory generally is that part of the United States, except New England, which lies North of the Potomac and Ohio Rivers and East of a line through Buffalo, N. Y. and Pittsburgh, Pa.

[7] Central Territory is generally that part of the U. S. North of the Ohio River, East of the Mississippi River, and West of Trunk Line Territory.

The fourth section origin departures which were the subject of the application herein occur only on direct routes (R. 10). Chicago, Illinois is not on the direct rail routes from the origins west of Kankakee, Illinois to the destinations involved (R. 150).

Illustrative of the origin fourth section departures via direct routes is the following table which shows the rates and distances from Moronts, Illinois, a station west of Kankakee on the Kankakee Belt to New York, N.Y., and the rates and distances from the first and last higher-rated origin stations intermediate from Moronts via the direct route (Exhibit 21).

	Distance to New York, N. Y. (Miles)	Rate on Corn Products to New York, N. Y. (Cents per 100 lbs.)
Moronts, Ill.	991.3	59.5 (Combination rate)
Kankakee, Ill. (First higher-rated intermediate point)	907.8	72.0
Hamilton, Ind. (Last higher-rated intermediate point)	740.3	61.0

Appellants by petitions (separate from their petitions for suspension) objected to the issuance of the fourth section relief (R. 177, 234). However, the Commission's Fourth Section Board, by order entered August 27, 1957, entered temporary Fourth Section Order No. 18784 in which it stated that (R. 89):

> "The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act."

The order of the Fourth Section Board was appealed by Mechling (R. 90), and Division 2 of the Commission, acting as an appellate division, voted to sustain the action of the Fourth Section Board. The Notice of that action, dated August 28, 1957, states that (R. 92):

> "The action of the Fourth Section Board and of Division 2 does not constitute approval of the rates. They may be subject to an investigation through formal complaint filed in accordance with the Commission's Rules of Practice."

The Commission set the railroads' application for fourth section relief for hearing (R. 92-94), but did not institute an investigation under Sections 15(1) or 15(7) of the Act into the lawfulness under other sections of the Act of the rates that became effective in 1956 without protest, or of the protested rates that were published to become effective August 29, 1957. Appellants did not file a complaint under Section 13 of the Act assailing the lawfulness of rates under other sections of the Act and the case went to hearing solely "in the matter of the fourth-section relief sought (R. 11)".

B. The Commission Hearing.

Appellants appeared at the hearing as protestants in opposition to the granting of the railroads' fourth section application (R. 291-292). At that hearing the railroad applicants presented evidence addressed to the issues presented by the fourth section application, those issues being whether or not the rates are no lower than necessary to meet competition; are reasonably compensatory; whether the rates from the intermediate origins are reasonable; and whether the competitive situation at the more distant origins differed from that at the intermediate origins so as to justify exemption from the requirements of Section 4.

1. Competitive Issue.

Because the rates had been in effect during the year prior to the hearing, their competitive effect had been tested by the actual flow of the traffic and evidence of that movement was presented at the hearing. The following table shows the barge movement of corn via the Illinois River to Chicago and the rail shipments of corn from the Kankakee Belt stations involved both prior to and subsequent to the publication of the competitive rates on December 15, 1956:

	CORN (Bushels)		
	Barge[A] Receipts at Chicago	Barge Shipments from 10 competitive Ports to Chicago	Rail Shipments from Stations West of Kankakee Stations
1935	723,000	Not Available	Not Available
1940	16,266,000	Not Available	Not Available
1956	26,210,000	24,647,211[B]	926,000[D]
1957	34,199,000	27,883,753[C]	5,362,000[E]

[A] Exhibit No. 3.

[B] 11 month period Dec. 15, 1955 to Nov. 11, 1956 projected on an annual basis at 56 pounds per bushel (Exhibit 19).

[C] 11 month period Dec. 15, 1956 to Nov. 11, 1957, projected on an annual basis at 56 pounds per bushel (Exhibit 19).

[D] 464 carloads of 2,000 bushels (Exhibit 4).

[E] 2,681 carloads of 2,000 bushels (R. 833).

The rail shipments during 1956 were almost entirely corn for export (R. 297) and more than 20 percent of the 5,362,000 bushels shipped by rail in 1957 were export shipments (R. 321) which moved on rates not involved here and which are 5 to 7 cents less than the competitive combination rates for which fourth section relief was sought (R. 306). In spite of the reduced rail rates, the barge route maintained an overwhelmingly dominant position in the transportation of corn from the Kankakee Belt Territory.

In addition to the movement figures under the competitive rates and the rate comparisons (Exhibit 10), the Commission had before it evidence of bids for corn for both rail and barge movement which showed that under the competitive conditions created by the reduced rail rates "the river bids are seen to be higher on the average than the rail bids" after adjustment to place them on a similar basis for comparison (R. 20).

The Commission also found that:

> "• • • The northern Illinois territory produces a surplus of corn. At one time, the corn moved over all-rail routes to eastern destinations. However, the development of commerce on the Illinois River about 20 years ago started a diversion of the all-rail movement to barge-rail routes extending from river ports by barge to Chicago, Ill., and thence by rail to eastern destinations. In 1935, 1940, and 1957, respectively, about 1.5, 19, and 59 million bushels of grain, including 0.7, 16, and 34 million bushels of corn, moved by barge from all Illinois River ports to Chicago. The bulk of the corn moved by barge originates at the 10 river ports which range from 4 to 36 highway-miles from the Belt origins, and is drawn from farms ranging up to 40 miles from the ports.
>
> "The primary business available to the New York Central at the origin points is grain, predominately corn, traffic. During 1954, 1955, and 1956, respectively 467, 729, and 615 carloads of grain, including 305, 533, and 464 carloads of corn originated thereat. Most of it was Commodity Credit Corporation corn which is usually shipped by rail for export, and is not subject to the same competitive forces as 'free' corn. In 1957, however, for the 6-, 8-, and 12-month periods ended June 30, August 31, and December 31, 1957, respectively, 1,915, 2,411, and 2,681 carloads of corn were originated at the Belt origins." (R. 13-14)

and further found that:

> "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief. (R. 27):

and, in referring to the effect of the competitive rail rates on the barge movement, found:

> "At the same time the 10 competitive river ports, notwithstanding their loss of traffic to the Belt, increased their shipments of corn to Chicago from 402,105 tons in the period December 15, 1955, to August 30, 1956, to 493,668 tons in the corresponding period the following year during which time the proposed rates were in effect. It is apparent that while corn grown adjacent to the Belt was attracted to the rails, that grown adjacent to the river remained with the barges. Thus, it is evident that the proposed rates are not lower than necessary to meet the barge competition." (R. 28)

The Commission also found that the competitive rail rates which were no lower than necessary to meet the barge competition permitted the country elevators served by the Kankakee Belt to resume operations that had been discontinued as a result of the virtual monopoly the barge route had obtained in the movement of corn from this area (R. 27).

2. Reasonably Compensatory Issue.

To show that the reduced rates are reasonably compensatory as required by Section 4, the applicants presented rate and earning comparisons and evidence of the operating and cost saving effect of the combination rates from the

stations west of Kankakee which caused the origin fourth section departures.

The mechanics of the rate application are shown by the following illustrations of a shipment from Moronts, a station west of Kankakee, milled in transit at Kankakee, and delivered to New York, N. Y. For the move from Moronts to Kankakee, a flat rate of 25 cents per hundred pounds is paid (R. 302). After milling in transit and reshipment to New York, the shipment qualifies for the combination rate of 59½ cents composed of the 5½ cent proportional rate to Kankakee and the 54 cent proportional rate from Kankakee to New York. The 34½ cent balance of the total 59½ cent charge due on the shipment is then paid. The corn lost in milling, called shrinkage, bears the 25 cent flat rate to Kankakee[8] (R. 580). The only function of the 5½ cent proportional rate is the determination of the through charges. It is not a separate charge. It has no independent application being but an integral part of the rate which applies on the through transportation from origin to ultimate destination (R. 25).

As "it is only by application of the through combination that the fourth section departures subject to this proceeding are created (R. 25)", applicants presented evidence to show that the through combination rate is reasonably compensatory. The compensativeness of the combination rate was demonstrated by rate and revenue comparisons as to which the Commission found:

> "During the 8-month period ended August 31, 1957, the corn and corn products movement of the General Foods Corporation yielded average revenues of $66.07 per car, 110,076 pounds, and $1.685 per car-mile for

[8] Since shrinkage is always experienced the net effect is to increase the inbound revenue.

39.21 miles, from Belt origins to Kankakee; $403.33 per car, 81,775 pounds, and 47.7 cents per car-mile for 845.7 miles, from Kankakee to eastern destinations; and $448.42 per car and 50.69 cents per car-mile for 884.7 miles, from Belt origins to eastern destinations. In the same period, the movement of Evans Milling Company yielded average revenues of $59.42 per car, 109,137 pounds, and $2.38 per car-mile for 24.95 miles, from Belt origins to Kankakee; and $407.38 per car, and 61.62 cents per car-mile from Belt origins to eastern destinations, including Ohio via Kankakee and Indianapolis. The proposed rates did not apply to Ohio destinations during the period, and, excluding such shipments, the car-mile earnings averaged 51.09 cents. For 1955, the average revenues of the New York Central were 40.015 cents per car-mile for its average haul of 236.58 miles. Between 1948 and 1956, inclusive, the average railroad revenue from corn ranged from 73 to 95 cents per short line car-mile. On the products of agriculture, earnings ranged from 42 to 48 cents and on selected grain and grain products (including corn and corn products) 57 to 71 cents. Distances on which the study producing these figures was based were not shown. Actual distances would produce lower earnings, but in many instances actual mileages are close to short-line mileages.

The proposed combinations from Belt origins to 18 representative destinations via Kankakee, and the reshipping rates from Chicago to eastern destinations, reflect averages of 14.4 and 13.1 percent, respectively, of the docket 28300 first-class rates. On ex-lake grain, from Buffalo and Oswego, N. Y., and Erie, Pa., to tidewater ports, applicants maintain export proportional rates which range from 6.3 to 9.5 percent of the same first-class rates. Also, from certain Belt origins to New York City and Boston, Mass., applicants maintain export rates on grain which are lower than the combination of proportionals over Kankakee. For example, from Dwight, the combination domestic rates are 59.5

and 61.5 cents to New York City and Boston, respectively, and the export rate is 54.5 cents to both ports." (R. 22-23).

The New York Central's evidence also showed that its revenues are increased and its expenses are reduced by reason of its handling of the traffic on the combination rates from the stations west of Kankakee, rather than handling the traffic from Chicago on the reshipping rates. As to this evidence, the Commission found:

> "The operating distance of the New York Central from Chicago to Kankakee is 75 miles compared with the weighted average distance of 38.3 miles from Belt points to Kankakee. The aggregate distances from Belt to Kankakee via truck to the river, thence barge to Chicago, and thence the New York Central to Kankakee exceeded by 133 to 797 percent the distance from Belt points to Kankakee, and to certain eastern destinations. The distances from Chicago via Kankakee exceeded by 3.73 to 20.61 percent the distances from Belt points via Kankakee. The line of another carrier, Illinois Central Railroad, from Chicago to Kankakee is more direct than that of the New York Central. The proposed rates apply from Belt points to eastern destinations via either Kankakee or Chicago.
>
> The switching of loaded and empty grain cars from and to terminal elevators at Chicago for the transportation of corn to Kankakee, Indianapolis, Paris, and Danville, by the New York Central is more complex than its handling of cars at Belt origins for movement to the same destinations. Switching charges absorbed by the New York Central on corn from Chicago to Kankakee during 2 months in 1956 averaged about 2 cents per 100 pounds. Avoidance of this cost item and the shorter weighted average distance from Belt points as compared to the distance from Chicago to Kankakee support the New York Central's contention that handling corn from the Belt points is less expensive than

from Chicago. Further support lies in the fact that no additional trains or power units were needed to handle the increased corn traffic from the Belt points, since the regular trains drop off the empties when westbound and pick up the loaded cars when eastbound. The exact extent to which handling is less expensive on the Belt than at Chicago is not shown.

The New York Central, for its haul from Chicago to Kankakee, assesses the local rate, but upon transit it is credited to the Chicago reshipping rate applicable via Kankakee, out of which it was required to absorb switching charges. At the proposed rate, it receives after transit the full amount of the proposed inbound proportional rate of 5.5 cents for its haul from Belt origins to Kankakee, and avoids the Chicago switching absorption. Thus by handling traffic at the proposed rate, its revenues are increased by 7.5 cents per 100 pounds over its previous handling, and its expenses are reduced in accordance with the reduction in miles from the 75 between Chicago and Kankakee to the lesser weighted average distance of 38.3 miles from Belt points to Kankakee." (R. 23-25)

3. Reasonableness of Rates from Intermediate Origins.

The record shows that the rates via the direct routes from the higher-rated intermediate origins, Kankakee and stations east thereof, have been in effect for more than 35 years, unchanged except for general increases or decreases in the rate level (R. 309). There was no challenge to the reasonableness of the rates from the higher-rated intermediate origins.

4. The Differing Competitive Situation at the Intermediate Origins.

The only protestant before the Commission from intermediate origins via the direct routes over which fourth section departures occur was the Indiana Farm Bureau

Cooperative Association, which is not an appellant. The record showed and the Commission found that barge competition existed from the stations west of Kankakee. There is no barge competition from the intermediate origins (R. 310). As to the contention of that protestant, the Commission found:

> "Among its 150 to 200 Indiana shipping points are stations intermediate from Kankakee to eastern destinations on the New York Central from which the rates on milled-in-transit corn to those destinations are as much as 10 cents higher than the proposed rates. Combination rates on corn via barge to Chicago thence by rail to these destinations are lower than the local rates from intermediate Indiana destinations and are applicable over Kankakee as well as Chicago. Shifting some of the Belt corn from barge to rail, which is the effect of the proposed rates, would not alter the present competitive relationship at eastern markets between it and Indiana corn." (R. 18).

5. Board of Trade Presentation.

Appellant Board of Trade of the City of Chicago (Board of Trade) presented evidence to show its interest in rates on grain, including corn and corn products, which showed that the receipts of all grain at the Chicago market increased from 85,791,000 bushels in 1935 to 227,823,000 bushels in 1957, and that receipts of corn increased from 27,841,000 bushels in 1935 to 99,396,000 bushels in 1957 (Exhibit 44). The principal burden of the Board of Trade's evidence was to show that the combination rates via Kankakee to the east were lower than necessary to meet competition of the circuitous barge-rail route via Chicago. (R. 805-812, Exhibits 50-55). As stated by the Commission, the Board of Trade raised "certain issues, principally discrimination against whole corn by the milling in transit

limitation; discrimination against Chicago by the proposed rate-combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitation in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations." (R. 26). While the rail applicants deny that the Kankakee combination rates prejudice or discriminate against the Board of Trade, they made no effort to meet or disprove those contentions of the Board of Trade which stemmed from its interest in the rate structure and were irrelevant to the much narrower issues of the fourth section application for exemption from the requirements of Section 4 via direct routes which do not operate through Chicago. As to the collateral arguments made by the Board of Trade, the Commission held that:

> "* * * these issues do not directly deal with the fourth section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago." (R. 27).

6. Mechling Presentation.

As was the case of most of the protestants at the hearing, Appellant A. L. Mechling Barge Lines, Inc. (Mechling) opposed the granting of the fourth section application on

the grounds that the rates were lower than necessary to meet the competition of the barge-rail route. Additionally, that appellant argued issues under other sections of the Act that were not presented by the railroads' fourth section application which was the only matter set for hearing (R. 92-93).

At the hearing Mechling, through cross-examination of the railroads' Witness Tascik, attempted to develop facts which it claimed showed a violation of Section 3(4) of the Act through a difference between the Chicago proportional or reshipping rates that apply on corn brought to Chicago by barge and the divisions of the Kankakee reshipping rate via circuitous routes through Chicago (R. 340). Objection to this line of cross-examination was sustained by the hearing examiner on the ground that the inquiry was not pertinent to the issues presented at the hearing (R. 343). Mechling made no effort to develop this point through its own witnesses.

Witness McWilliams, called by protestants before the Commission which are not appellants here[9] presented a cost calculation based on unsifted averages without adjustment for actual operations and without any study of the operation along the Kankakee Belt Line (R. 606). The witness calculated the out-of-pocket and fully distributed rail cost of transporting corn from the stations west of Kankakee to Kankakee as being 8.56 and 13.12 cents per hundred pounds (R. 601). While the Commission recited those figures (R. 25, 26), it did not find that they reflected the New York Central's cost to Kankakee. Applicant did not rebut the average calculations for the reason that the

[9] Witness McWilliams was called by the attorney for Cargill, Inc., Illinois Grain Corporation and Indiana Farm Bureau Cooperative (R. 292, 590).

compensatory issue in the fourth section proceeding, as they understood it, related to the compensativeness of the aggregate through charge from origin to destination via the direct routes. Mechling, relying on the averages submitted by the witness for other protestants argued that the 5½ cent rate was noncompensatory. It also argued that a comparison of those averages with Mechling's own costs to Chicago showed that Mechling was the low cost carrier as contrasted with the railroad and that the handling of traffic on a noncompensatory rate (which fact was not proven or found by the Commission) constituted destructive competition (R. 26). This argument was made even though the barge movement of corn continued to increase in spite of the competitive rail rates (Exhibit 3).

C. The District Court Proceeding.

All of the questions presented here were presented to the statutory three judge District Court which dismissed the complaint holding that:

> "Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to utilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. (Citations omitted)" (R. 77)

and that the commission's

> "* * * order . . . was within the statutory power of the Commission, that it is supported by findings and conclusions based on substantial evidence, and that no prejudicial error occurred in the hearings before the Examiner and Commission." (R. 80)

IV.

ARGUMENT.

A. Summary.

(1) The Commission finding that the rates are not lower than necessary to meet competition is based on and required by the evidence. Thirty-one of the 35 witnesses who testified at the proceeding testified as to the competitive issue. The Commission's discussion of the contentions of the parties in respect to the competitive issue is thorough and detailed. (R. 13-22; 27-28). It is clear therefrom that the Commission fairly considered the entire record in making its ultimate finding on the competitive issue. While the Commission must consider all of the evidence, its finding of facts, if supported by evidence, must be sustained. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546 (1942). Here the Commission's finding is required by the evidence.

(2) The correctness of the Commission's basic determination of the compensatory issue on consideration of the through or aggregate charges from origins west of Kankakee to destinations in the East is clear from the language of Section 4 of the Act and the cases cited by the District Court. The statute plainly refers to "greater compensation in the aggregate" and "any charge to or from the more distant point." There was no challenge as to the compensativeness of the through charges from origin to destination. The Commission found that the through charges involved were on a higher level than export rates on corn from the same origins to New York, and on a higher level than other grain rates with which they were compared, (R. 23); and further found that by handling traffic on the proposed through rates New York Central's revenues are increased by 7.5 cents per hundred pounds and its expenses

are reduced by reason of the less expensive handling of corn from stations west of Kankakee than from Chicago (R. 24). The Commission also found that the rates are not lower than necessary to meet the barge competition (R. 24) and finally found that, "The rate and revenue comparisons and cost-saving evidence submitted by the New York Central and its supporters established the compensativeness of the proposed rates." (R. 28). These findings, based on substantial evidence, fully meet the time-honored definition of a reasonably compensatory rate set forth in *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71, which was quoted by the Court below. There is no basis for the assertion that the rates are non-compensatory as required by Section 4 or that the competitive portion of the rate is subsidized by a non-competitive portion of the rate. The Commission specifically found to the contrary. (R. 23-25).

(3) That the Commission is not required to make a final determination in respect to the lawfulness of the rates under other sections of the Act in a hearing limited, as this one was, to the railroads' fourth section application was decided by this Court in *United States* v. *Merchants & Manufacturers Traffic Association*, 242 U.S. 178 (1916). See also *Scatrain Lines, Inc.* v. *United States*, 168 F. Supp. 819 (N.D.N.Y. 1958); *Koppers Company* v. *United States*, 132 F. Supp. 159 (W.D. Pa., 1955) and *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517, 526 (N.D. Fla., 1956).

Intermountain Rate Cases, 234 U.S. 476 (1914), cited by appellants and decided prior to *United States* v. *Merchants & Manufacturers Traffic Assn.*, *supra*, does not deal with the question presented here. In that case this Court interpreted Section 4, as amended in 1910, held that it was constitutional, and held that orders of the Commission entered thereunder were reviewable. This Court's discussion of "The Meaning of the Statute" at pages 480-486, makes it

clear that its reference to "the preference and discrimination clauses of the second and third section" of the Act was to discrimination against or prejudice to intermediate short haul shippers who would be adversely affected by lower long haul rates. At pages 482-483 of that opinion, this Court pointed out "* * * that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than for a shorter haul, such exaction being authorized could not be preference or discrimination and therefore illegal." Thus, while that case requires the Commission to find that a special case exists to excuse what otherwise would be discrimination or prejudice to the intermediate short haul shippers, it does not require the Commission to make a final and ultimate determination of the lawfulness of the rates under other sections of the Act.

Neither the Commission nor the Court below held that the Commission is excused from taking cognizance of the National Transportation Policy and applying the Act as a whole as required by *American Trucking Assns., Inc.* v. *United States*, 355 U. S. 141 (1957). The Commission's report is replete with discussion of the evidence and contentions of the parties and includes the finding that in this instance the railroad's efforts to secure traffic do not amount to a destructive competitive practice (R. 26). However, the requirement that the Commission administer the Act consistent with the National Transportation Policy does not demand that the Commission modify its procedures and make specific ultimate findings under sections of the Act other than those under which the proceeding is held. The Commission did not change its procedures in this case. The Commission reports cited by appellants do not establish the proposition that the Commission must determine all issues in a fourth section hearing. Most of the cases cited

by the appellants were (a) not fourth section proceedings, or (b) general investigation proceedings under Section 15(7) of the Act where the lawfulness of the rates is at issue, or (c) cases in which the relief sought was granted, or (d) where the rates did not meet the requirements of Section 4.

(4) The Commission's report and order are in full accord with the National Transportation Policy. The Commission found that the rates are not lower than necessary to meet competition; that the barge movement of corn increased; that the New York Central's revenues were increased and its expenses reduced in contrast to the situation in the prior handling of the traffic via circuitous routes through Chicago. The Commission found that the rates do not constitute a destructive competitive practice, which conclusion is consistent with the lack of probative evidence of any inherent cost advantage of the barge-rail route over the competitive all-rail route.

B. Introduction.

Before discussing the questions presented by appellants, it is necessary that their interests be placed properly in perspective through an examination of their relative position prior to and subsequent to the publication of the involved rate. Before the publication of the rate, corn milled in transit at Kankakee originating at a point near the Kankakee Belt had to move through Chicago an average distance of 168.8 miles[10] instead of direct to Kankakee an average distance of 38.3 miles (R. 305). Then the corn had to move over the circuitous route from origin to Chicago

[10] Composed of the average river distance from Illinois River ports competitive with the Kankakee Belt to Chicago and the 75 mile rail haul from Chicago to Kankakee (Exhibit 39).

via barge because of the rate advantage of the combination of barge and rail rates to eastern destinations. This situation had the net results of bestowing virtual monopolies on both the Board of Trade and Mechling. Understandably, both appellants wish the restoration of these monopolies.

The publication of the involved rate had the net effect of permitting some corn and its products to move directly through Kankakee instead of over the much longer route via Chicago. Obviously, appellants were not in a position to object to the granting of fourth section relief on the grounds that their respective monopolies would be destroyed. Further, since neither of them has any interest in the higher rates applying from intermediate origins via the direct routes for whose benefit Section 4 had principally been enacted, they adopt the position that the hearing which had been set for the sole purpose of determining whether the applicant had met the criteria of Section 4. was, in fact, a general rate investigation which the Commission had declined to initiate under Section 15(7) of the Act. As will be demonstrated in greater detail below, Mechling even went so far as to attempt to pursue the argument that a violation of Section 3(4) of the Act existed even though the existence of such an alleged violation would be entirely unrelated to the rate publication involved and would not be abated through the vacation of the fourth section order involved.

Only two of the questions presented by these appeals deal with Section 4 of the Act, the provision of law under which the proceeding before the Commission was heard.

One question dealing with Section 4, raised only by Mechling, is:

> (A) Whether the Commission erred in concluding and finding that the rates in question are lower than

necessary to meet competition (Mechling Question 5, Brief, p. 5, 37-41).

It is submitted that the Commission finding is correct and is based on and fully required by substantial evidence of record. The other question dealing with Section 4, also raised only by Mechling, is:

> (B) Whether the Commission erred as a matter of law in determining the compensatory character of the rates within the meaning of Section 4 on consideration of the through charges that result from the combination of the proportional rates to and from Kankakee (Mechling Brief Question 4, Brief, pp. 4, 19-27).

The United States has confessed error. However, in its brief, it agrees with and supports the correctness of the Commission's construction of Section 4, stating that Section 4 prohibits the granting of relief "only if the total rate for a *longer* haul is not compensatory" (Brief, pp. 31-32). It is submitted that the Commission correctly construed Section 4 in the only logically permissible way.

All other questions bear on issues under provisions of the Interstate Commerce Act other than the one under which the Commission hearing was held. It is submitted that those questions fairly fall into two groups.

> (A) Is the Interstate Commerce Commission required to finally decide issues as to lawfulness of rates under Sections 1(5), 3(1), and 3(4) of the Interstate Commerce Act in a proceeding held solely on an application for relief via direct routes only from the long and short haul prohibition of Section 4 of the Act. (Board of Trade Question Brief p. 2, Mechling Brief, p. 19; United States Questions 1 and 3, Brief, p. 2)

As to this question, appellee submits that the Commission was not required to convert a hearing on the narrow issues

of a fourth section application limited to relief via direct routes only into a general investigation of the lawfulness of rates under all sections of the Act via circuitous as well as direct routes.

1. The Section 1(5) Argument.

Mechling argues that the proportional rate to Kankakee is noncompensatory and therefore unlawful in violation of Section 1(5) of the Act (Mechling Brief, pp. 8-9, 27). The United States also argues that the proportional rate is noncompensatory (United States Brief, pp. 30-31).

The Commission did not find, as stated by Mechling, that the proportional rate is noncompensatory (Brief, p. 20); nor did the New York Central concede, as stated in the brief of the United States (Brief, pp. 30-31), that the 5½ cent proportional rate was less than its costs[11]. What the Commission did was recite the fact that a cost calculation was submitted and what that calculation showed, as follows:

> "The protestants submitted a study of the system average costs of the New York Central and the territorial average costs of the eastern district railroads. On the average 55 ton load, the out-of-pocket costs of the New York Central and the eastern district railroads are 8.56 and 8.57 cents per 100 pounds, respectively

[11] The brief of the United States states that it was undisputed that the 5½ cent rate did not cover the rail carriers' out-of-pocket cost (p. 17) and the rail carriers' adjustment of the out-of-pocket cost computation indicated that the cost exceeded the 5½ cent rate by almost 1.5 cents (p. 30). That brief relies on a statement in the Examiner's report which is not included in the Commission report (R. 48). While the railroad applicants at all times argued that only the compensativeness of the through charges was at issue, an *arguendo* discussion in their brief showed numerous overstatements in the cost calculations. The Examiner's reference to a 6.9 cent cost reflected but one of the adjustments that would be necessary to refine the costs. New York Central has never conceded that the 5½ cent proportional rate is noncompensatory. It is its opinion that it is compensatory.

> for the weighted average distance of 38.3 miles. On minimum loads of 50 tons and for the simple average distance of 46.4 miles, the out-of-pocket costs range up to 9.66 cents per 100 pounds." (footnotes omitted, R. 25).

While the Commission recited the contention of one of the protestants' cost witnesses, it did not find that the calculation was correct. The witness admitted that his calculations were based on average figures (R. 603, 607) and that he had made no study of transportation conditions on the Kankakee Belt line (R. 606). While the hearing examiner found the 5½ cent proportional rate to be noncompensatory on the basis of those unsifted average costs (R. 48), the Commission omitted the Examiner's cost conclusion. Logically, this can only mean that the Commission was of the opinion that that evidence, the only evidence dealing with the compensativeness of the 5½ cent rate, was insufficient to show that it was not compensatory.

2. The Section 3(1) Argument.

Appellant Board of Trade states that "the effect of the milling in transit requirement, for all practical purposes, was to prevent Chicago grain merchants and elevator operators from buying whole corn off the Kankakee Belt (Brief p. 6)". This appears to be the principal factual basis for its contention that the rates violate Section 3(1). The argument seems to be that the milling in transit requirement unduly prefers millers of corn located at Kankakee or elsewhere, to the undue prejudice and damage of the Board of Trade and its members.

Appellant Mechling also seizes on this argument in its effort to defeat the fourth section order (Brief, p. 11). although elimination of the milling in transit restriction on the rate thereby making it more generally applicable

would seem to be inconsistent with Mechling's effort to conserve the virtual barge monopoly in the movement of corn from the Kankakee Belt area. Mechling's argument on an issue in which it has no real interest is indicative of the way contentions extraneous to the fourth section issues are presented to overshadow the fourth section issues decided by the Commission.

Appellants and the United States argue that in addition to making a final determination on the fourth section issues, the Commission was required to make a final determination of the Section 3(1) issue of the Board of Trade in respect to claimed prejudice to the Board of Trade and its members at Chicago.

Chicago is not on the direct routes from the Kankakee Belt origins to the East (R. 150). Section 4 of the Act, as amended July 11, 1957, limits the prohibition of the long and short haul clause to the direct routes only (71 Stat. 292). The Commission's fourth section order is limited to the direct routes only (R. 29). Certainly the Commission in entering a fourth section order via direct routes should not be required to finally determine the lawfulness of rates via numerous circuitous routes under other sections of the Act[12] in hearing limited to the fourth section via direct routes.

The Commission did not decide the Board of Trade's contention under Section 3(1) of the Act stating "that these issues do not directly deal with the fourth section issues involved, but are properly matters that may be raised in investigation or complaint proceedings (R. 27).

[12] For example, Exhibit 59 shows 15 routes from the Kankakee Belt stations to Pittsburgh, Pa. By definition there is but one short route and at least 14 circuitous routes. Multiply this by the number of destinations and the number of circuitous routes become unwieldly.

The railroads did not present evidence on this issue which is extraneous to section four but are of the opinion that the Chicago Board of Trade is not "unduly prejudiced" in violation of Section 3(1) of the Act. The Commission's comment that "there is no indication of undue damage to Chicago" (R. 27) reinforces this opinion. Indeed it is difficult to conceive how the competitive rail rates could unduly prejudice, *i.e.*, unduly damage, the Board of Trade. That is, if, as the Commission found, the reduced all-rail rate was no more desirable than the barge-rail rate, it necessarily follows that shippers on the all-rail route are at best competitively equal with shippers on the barge-rail route. Thus in the instant case, the granting of relief under Section 4 with requisite findings would have necessarily not created undue preference or prejudice.

3. The Section 3(4) Argument.

Appellant Mechling (Brief pp. 12, 32) and the United States (Brief pp. 37-39), claiming that there is reason to believe that the rate structure contains a violation of Section 3(4) of the Act argue that the Commission should have permitted a full inquiry into that allegation and was required to determine whether or not such a violation exists before it could enter its order under Section 4.

The allegation that there is, or may be, a violation of Section 3(4) is based on answers given on cross-examination by a railroad witness in respect to divisions of the Kankakee proportional rate. Appellant Mechling argues that the answers on cross-examination indicated that if the New York Central performed transportation on the reshipping rate from Kankakee to Chicago and the corn and corn products were forwarded from Chicago to New York by another carrier, the New York Central would receive 13

cents of the reshipping rate and the other carrier would receive the balance of the reshipping rate, or 41 cents.[13] It is the apparent difference between that balance of 41 cents received by a New York Central connection at Chicago and the 54 cent Chicago proportional reshipping rate to New York that is the basis for the argument that there may be a violation of Section 3(4).

In argument of this question Mechling reaches for an issue patently unrelated to the fourth section issue before the Commission. There was no change in the reshipping rates from either Kankakee or Chicago to Eastern destinations (R. 300). The Kankakee reshipping rate has long applied via routes through Chicago just as the Chicago reshipping rates have applied over routes through Kankakee (R. 320). Cancellation of the fourth section order under review would not change that situation. The only effect would be to prevent the movement of corn from the stations west of Kankakee unless the railroads elected to reduce the rates from Kankakee and other intermediate origins on the direct routes which do not apply through Chicago. In either event the Kankakee reshipping rate would continue to apply via Chicago and would be divided between the railroads that deliver the corn to Chicago and the railroads that forward it from Chicago.

If there be a violation of Section 3(4), which these appellees deny, it existed prior to the establishment of the competitive combination rates; it is not caused by those rates; nor is it caused by the fourth section order; and it would not in any circumstances be eliminated by cancellation of the fourth section order. The Commission in

[13] In its brief Mechling refers to a reshipping rate of 49.5 cents from both Kankakee and Chicago to New York (p. 12), at the time of the hearing those reshipping rates were 54 cents (R. 303).

deciding the issues under Section 4 was not required to make a determination of issues dealing with an alleged violation of the rate structure that is independent of the fourth section relief granted.

The other question raised by the appeals which does not directly deal with Section 4 is:

> (B) Whether the Interstate Commerce Commission's finding that the rates do not constitute a destructive competitive practice is supported by the evidence and is consistent with the National Transportation Policy (United States Question 2, Brief, pp. 2, 30-37; Mechling Brief, p. 19).

The Commission found that: the rates "are not lower than necessary to meet competition" (R. 28); that the barge movement of corn from the competitive ports increased after the reduced rail rates became effective (R. 28); that the evidence showed that the result of the rate was to increase the New York Central's revenues over and reduce its expenses under its revenue and expenses on the prior handling of the traffic from Chicago (R. 24). Appellees submit that these findings which are supported by evidence fully disprove the contention that the Commission failed to give due consideration to the National Transportation Policy.

C. Reply to Arguments in Respect to Questions Under Section 4 of the Act.

1. The Commission finding that the rates are no lower than necessary to meet competition is based on and required by the evidence.

Mechling argues that the rates are lower than necessary to meet competition. Essentially this is an assertion that the Commission erred as a matter of fact (Brief pp. 37-41).

The Commission recognized the requirement of Section 4 that the rates may not be lower than necessary to meet competition (R. 27) thus the Commission was well aware of this principle as stated in the cases cited by Mechling.[14]

The record before the Commission included 852 pages of transcript taken at the hearing. Thirty-five witnesses testified and were cross-examined, thirty-one of which testified in respect to the competitive issue.[15] It may fairly be characterized as having dominated the hearing with Appellant Mechling and others who were interested in preserving the barge monopoly on the transportation of corn from the Kankakee Belt area contending that the combination rates to the east based on the 5½ cent proportional rate should be as much as 9 to 13 cents higher (R. 21, 22). Of course, those contentions are absurd in the face of the movement figures which showed that the barge route remained the overwhelmingly dominant factor in the transportation of corn under the competitive conditions created by the rates contended to be lower than necessary to meet competition (R. 28).

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[14] *Skinner & Eddy Corp.* v. *U. S.*, 249 U.S. 557, 568 (1919); *Citrus Fruit from Florida to North Atlantic Ports*, 266 I.C.C. 627, 636-638 (1946); and *Pacific Coast Fourth Section Applications*, 264 I.C.C. 36 (1945) cited at page 37 of Mechling Brief.

[15] The witnesses that testified on the competitive issue and the reference to the pages of the record at which their testimony appears are: Tascik (R. 293-396); Gibbons (R. 442-461); Cahill (R. 462-481); Hoyle (R. 482-487); Nader (R. 489-498); Schier (R. 501-514); Geekie (R. 515-520); Graves (R. 522-557); Schaller (R. 557-577); Wilson (R. 608-616); Mechling (R. 617-640); Scott (R. 642-652); Funk (R. 653-657); Antrim (R. 660-664); Tallyn (R. 667-672); Herron (R. 673-678); McGowan (R. 679-680); Thomas (R. 681-683); Gage (R. 684-685); Brehman (R. 689-691); Gally (R. 693-697); Treasure (R. 699-706); Mrs. Bookwalter (R. 706-713); Farlow (R. 713-715); Dewey (R. 717-723); Cunningham (R. 723-742); Adams (R. 744-751); McClintock (R. 752-770); Dawse (R. 771-774); Springrose (R. 775-793); Chartrand (R. 794-820).

The case was thoroughly briefed by all parties and was orally argued before Division 2 of the Commission which unanimously found the rates to be no lower than necessary to meet competition. The Commission discussion of the evidence and contentions of the parties in respect to the competitive issue is thorough and detailed (R. 13-22; 27-28). It is clear therefrom that the Commission fairly considered the entire record in making its ultimate finding on that issue.

The Commission is the trier of facts. While it is true that the Commission's findings must be supported by the evidence before it, it is the Commission's function to weigh that evidence and the Commission's findings of fact must be sustained if supported by any substantial evidence. *U.S.* v. *Pan America Corp.*, 304 U.S. 156 (1938); *Alton Railroad Company* v. *United States*, 315 U.S. 15, 23 (1942); *United States* v. *Pierce Auto Lines*, 327 U.S. 515 (1946). The Commission is the expert body designated by Congress to determine such technical and complicated questions of fact. *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942). As the tribunal appointed by law, and informed by experience, the Commission here did find upon consideration, of all evidence of record that the rates are not lower than necessary to meet competition. The argument of Mechling on this issue, which is a contention that the Commission erred as to the weight and significance that should be placed on certain of the facts of record, totally fails to show that the Commission erred.

2. The Commission Correctly Determined the Compensativeness of the Rates Within the Meaning of Section 4 on Consideration of the Through Charges.

Appellant Mechling makes no argument that the Commission erred in finding the through charges from the ori-

gins west of Kankakee to be compensatory but charges that the Commission erred in not confining its considerations on the compensatory issue under Section 4 of the Act to the 5½ cent proportional rate to Kankakee (Mechling Brief, pp. 20-26). The only case cited by Mechling in support of this argument is *Transcontinental Cases of 1922*, 741 I.C.C. 48, 70-71 (1922)[16] in which the Commission defined a reasonably compensatory rate, but that case does not deal with the point raised by appellant.

The 5½ cent proportional rate to Kankakee is not a rate in and of itself. It has no independent existence and is never charged to a shipper for moving corn to Kankakee as on all such shipments the full local rate is assessed (R. 580). Its only function is in the determination of the through charges from origin to ultimate destination (R. 25).

The proportional rate to Kankakee does not create fourth section departures. It is only when the proportional rate to Kankakee is combined with the reshipping rates from Kankakee to destination to produce a lower charge than the rate from Kankakee that a departure is created (See Table P. 6, *supra*). The only relief sought by the railroads and granted by the Commission was the authority to maintain lower charges from west of Kankakee to destinations east thereof than apply from Kankakee and other intermediate origins to the same destinations (R. 29, 140).

That the Commission correctly determined the compensative issue on consideration of the through or aggregate charges is clear from the language of Section 4 which in pertinent part provides:

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[16] The district court quoted the *Transcontinental Cases* definition of a reasonably compensatory rate under Section 4 and held that Commission's findings met the rule of that case (R. 79).

"It shall be unlawful for any common carrier subject to this part or part III to charge * * * *any greater compensation in the aggregate* for the transportation * * * of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, * * * *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of * * * property * * * but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of *any charge to or from the more distant point* that is not reasonably compensatory for the service performed * * *". (Emphasis supplied)

A plain reading of the statute which refers to "any greater compensation in the aggregate" and "any charge to or from the more distant point" is convincing that, as stated in the brief of the United States (p. 32), the Commission construed the section in the only logically permissible way. It was so construed by the Commission in *Imperial Coal Co.* v. *Pittsburgh & L.E. R. Co.*, 2 I.C.C. 436, 445 (1889), and *Sheldon Axle and Spring Co.* v. *L.V. R.R. Co.*, 53 I.C.C. 43, 45 (1919) and was so construed by the Court below (R. 78).

Mechling admits that the phrase "any greater compensation in the aggregate" does refer to the combination rates but makes the strained argument that the phrase "any charge to or from the more distant point" as used in the same paragraph has an entirely different meaning (Mechling Brief, pp. 21-22). That distinction is sheer sophistry. The fourth section deals with a specific form of discrimination which is prohibited unless the Commission excuses the carriers from its requirement. It is inconceivable that Con-

gress intended different meanings to these similar and parallel phrases in the same section of the Act.

The distinction made by Mechling is based on form rather than substance. As noted by the Commission, the rates from each origin to each ultimate destination could be filed as single-factor rates (R. 25). The through charges would remain the same and the compensatory issue under Section 4 would necessarily be decided on the compensativeness of the through charge to the more distant point. A holding that the standard under Section 4 is different merely because the total charge for the longer haul is composed of proportional factors (which have no independent existence) would not only strain the language of the fourth section but would be based on the shallow ground of form rather than meaningful substance.

D. Reply to Arguments in Respect to Questions Under Provisions of the Act Other Than Section 4.

1. The Commission is not Required to Finally Decide Issues as to the Lawfulness of Rates Under Sections 1(5), 3(1), and 3(4) of the Act in a Proceeding Held Solely on an Application for Relief from the Long and Short Haul Prohibition of Section 4 via Direct Routes Only.

The issues in the fourth section application proceeding before the Commission are solely those raised by the application of the railroads being whether there is a "special case" and whether the rates are "reasonably compensatory". *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (1958). As noted *supra,* p. 8, the hearing before the Commission was solely on the railroads' Fourth Section Application No. 33955. The application, the basis for the Commission hearing is analogous to complaints which form the basis for Commission hearings under Section 13(1) of the Act and the law and practice is well settled that the only issues

that can be considered in a hearing and investigation on complaint are those raised by the Complaint. *W. H. Mason Lumber Co.* v. *Baltimore & O. R. Co.*, 279 I.C.C. 210, 211 (1950); *American Iron & Machine Works* v. *Akron C. & Y. R. Co.*, 296 I.C.C. 737, 742 (1955); *Shaw Warehouse Co.* v. *Southern Ry. Co.*, 308 I.C.C. 609, 612 (1959). The asserted violations of other sections of the Interstate Commerce Act "do not directly deal with the fourth-section principles here involved, but are properly matters which can be raised in investigation or complaint proceedings (R. 27)." Neither Mechling nor the Board of Trade filed complaints under Section 13(1) of the Act and the Commission did not institute an investigation under Section 15(7)[17] of the Act. The Commission order assailed here specifically states that the Commission did not pass on the lawfulness of the rates filed under the permissive authority granted under the order. The order provides that:

> "The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act."

This provision is contained in all fourth section orders entered by the Commission consistent with the fact that only fourth section issues are determined in a hearing on requested relief from the long and short haul prohibition of Section 4(1) of the Act.

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[17] The Commission has discretionary power to institute a general investigation into the lawfulness of rate changes under Section 15(7) if it has reason to believe that the rates are unlawful. Both Mechling and the Board of Trade requested the Commission to institute such an investigation, but their petitions were not granted (R. 87, 90). The Commission is also empowered to institute an investigation under Section 15(1) of the Act which it did not do.

The Commission's action in confining its determinations to the issues raised by the fourth section application is fully supported by *United States* v. *Merchants & M. Traffic Association*, 242 U.S. 178 (1916). That opinion contains one of the most significant discussions concerning the nature of fourth section proceedings. In that case the Commission had granted extensive fourth section authority over a wide territory involving numerous destinations and intermediate points. Hearings were held. Thereafter, certain intermediate cities contended that the order was invalid because they had not been heard in the proceedings in which the orders had been entered. This Court stated (at page 188):

> "For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample remedy."

In pointing out that the plaintiffs there ought to have applied for redress under Section 13 instead of seeking a hearing on claimed discrimination against shippers and communities under Section 4, this Court declared (at page 188):

> "They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; and, as this case illustrates, the attempt of the court to remove some alleged unjust discriminations might result in creating infinitely more."

The *Merchants and Manufacturers* case clearly recognizes the distinction between (1) the determination of the issues on a fourth section application and (2) the determination of the lawfulness of the rates filed in conformance with the order. Applicants' distinction of that case on the ground that plaintiffs there were not parties to the Commission proceeding oversimplifies and misses the point of Mr. Justice Brandeis's holding (Board of Trade Brief, pp. 31-33; Mechling Brief p. 36; United States Brief p. 26).

That competing carriers likewise cannot raise the issue of discrimination in a hearing on the railroads' fourth section application is clear from *Seatrain Lines, Inc.* v. *United States, supra.* There a common carrier by water under Part III of the Interstate Commerce Act, a competitor of the railroad fourth section applicants, brought suit to set aside a fourth section order. Among the grounds urged by plaintiff water carrier was that its competitive position was adversely affected by the fourth section order which it alleged unduly and unjustly discriminated against it. The Court held:

> "The only questions presented for investigation by the Commission under Section 4 are whether there is a 'special case' and whether the proposed rates are 'reasonably compensatory'."
>
> * * * *
>
> "However, Section 4 does not contemplate that there shall be a determination in a Section 4 proceeding as to whether the rates charged are unduly discriminatory against a competing water carrier. This question must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act. In such proceedings a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission." (p. 824)

Appellants argue that the *Seatrain* holding is erroneous *dicta* (Board of Trade Brief pp. 34-35; Mechling Brief, p. 36; United States Brief pp. 27-28). However, as in the *Merchants and Manufacturers* case, the Court's ruling in *Seatrain* is based on the distinction between determination of issues in the granting of a permissive fourth section order which binds no one, and the determination of the lawfulness of rates under other sections of the Act.

See also *Koppers Company* v. *United States*, 132 F. Supp. 159 (1955), and *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (1956). The *Koppers* case was a suit to enjoin an order of the Interstate Commerce Commission which was dismissed for the reason that plaintiffs' remedy was under Sections 13 and 15 of the Act. The Court said:

> "In the case of a permissive order, the carrier is the only necessary party to the proceeding. The Commission represents the public. While it is proper and customary for shippers interested to participate in hearings, there exists no provision for notice to them. They are not bound by the order entered and the tariffs filed. If the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy. To permit shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission. The attempt of the court to remove some alleged unjust discrimination might result in creating more. *United States* v. *Merchants' & Manufacturers' Traffic Association*, 1916, 242 U.S. 178; 37 S. Ct. 24; 61 L. Ed. 233.
>
> "Sections 13 and 15 of the Act speak with clarity, and explicitly specify the procedure which complainants must pursue before the Commission in order to seek redress of grievances." (p. 162)

Appellant Board of Trade argues that the *Kopper* and *Florida Citrus* cases, which were also cited by the Court below, are not pertinent to the issue of whether the Commission is required to make a final determination of the lawfulness of rates under all sections of the Act in the proceeding in which it entered the permissive fourth section order (Brief p. 31). However, both the *Koppers* and *Florida Citrus* cases follow the *Merchants' & Manufacturers* case and distinguish between the determination of lawfulness of rates and the granting of a permissive order. In the *Koppers* case, the Commission order permitted greater increases in coal rates on which the plaintiff received coal than the increase in the rates on coal to competing receivers. The plaintiff which had been a party to the Commission proceeding contended that this was unreasonable, discriminatory, and unduly prejudicial (132 F. Supp. 159 at 161). Similarly, the *Florida Citrus* case distinguishes between the issuance of a permissive order which can be done without determination of lawfulness of rates and the determination of lawfulness of rates.

Appellants rely on *Intermountain Rate Cases,* 234 U.S. 476 (1914), in support of the proposition that the Commission must consider issues other than those under Section 4(1) of the Act. The significance of the quotation relied on by the Board of Trade (Brief, p. 18) and the United States (Brief, pp. 23-24), can only be gained on consideration of the issues presented to the Court in that case. That was a suit by railroads to set aside orders of the Commission entered in *Railroad Commission of Nevada* v. *Southern P. Co.,* 21 I.C.C. 329 (1911); and *City of Spokane* v. *Northern P. Ry. Co.,* 21 I.C.C. 400 (1911). In those cases the railroads had applied for relief from the long and short haul provision of Section 4 of the Act. The Commission

refused to grant the petition unqualifiedly, but entered a fourth section order permitting lower rates from the Atlantic Seaboard to the Pacific Coast provided that a proportionate relation was maintained between the lower rate for the longer haul to the Pacific Coast and the higher rate to intermediate points.

Those orders were challenged as being unconstitutional in that they were based on an unconstitutional delegation of legislative power in Section 4 of the Act, or that the orders were violative of Section 4 as properly construed. One of the basic questions was whether the I.C.C. had been given unlimited discretion without standards in the exercise of its authority to grant relief from the long and short haul prohibition of Section 4.

The Commission reports refer to the prejudice or discrimination to intermediate origins or shippers. No reference is made to the prejudice prohibited by Sections 2 or 3 of the Act which have broader application than Section 4. The Commission held that:

> "The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act." (21 I.C.C. 338).

and further said:

> "In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination

that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions." (21 I.C.C. 339)

The Commission went on to say that in dealing with the fourth section applications before it, it would apply the following principles:

"(1) That the fourth section as amended in 1910 is as a whole constitutional, a provision of law within the proper scope of Congressional jurisdiction.

"(2) That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act.

"(3) That it must be affirmatively shown by the carriers seeking such exception that injustice will not be done to intermediate points by allowing lower rates at the more distant points.

"(4) That the intendment of the law is to make its prohibition of the higher rate for the shorter haul a rule of well-nigh universal application from which this Commission may deviate only in special cases and then to meet transportation circumstances which are beyond the carriers' control; that is to say, a carrier shall not prefer the more distant point by giving it the lower rate because of any policy of its own initiation, but if at the more distant point it finds a condition to which it must conform under the imperious law of competition if it would participate in traffic to that point it may discriminate against the intermediate point without violating the law, provided it establishes such necessity before the Commission. But to this discrimination there may be a limit set by the Com-

mission. The discrimination may not be such as to offend the reasonable standards of the law, for it is said that the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section." (21 I.C.C. 341)

The whole sense of the reports of the Commission was a concern about prejudice or discrimination to intermediate points resulting from lower rates for longer hauls. That was the fact situation presented to the Commission and to this Court. In upholding the Commission order, this Court stated:

"• • • the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections." (234 U.S. 485-486.)

There the preference and discrimination considered was preference of long haul shippers and discrimination to the short haul shippers at intermediate points, i.e., the specific forms of discrimination prohibited by section 4.

The language of that case should not be stretched to include consideration under Section 4 of prejudice or discrimination at other than intermediate points. That interpretation is inconsistent with the subsequent opinions in *United States* v. *Merchants' & Manufacturers Association* and *Seatrain Lines, Inc.* v. *United States, supra.*

Appellants and the United States argue that the unitary design of the Interstate Commerce Act, emphasized by the National Transportation Policy, requires the Commission when acting solely under Section 4 of the Act to make final determination of lawfulness of rates under all other Sections of the Act (United States Brief pp. 24-25; Mechling Brief p. 35; Board of Trade Brief pp. 28-29). This argument that every prohibition or requirement of the Act is written into Section 4 conflicts with this Court's opinion in *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919). There, in reference to Section 4, it is stated that:

> "A special group of cases in which the Commission may indirectly prevent unduly low rates through its power to prevent unjust discrimination is that provided for by the long-and-short-haul clause. It was enacted to remedy one large class of discrimination by creating a legislative presumption that the charge of more for a short haul under substantially similar circumstances and conditions than for a longer distance over the same line in the same direction was unjust." (p. 566)

Mechling cites *American Trucking Ass'ns.* v. *United States,* 355 U.S. 141, 152 (1957), in support of the proposition that the Commission must make determination under Sections

1, 2, and 3 in this proceeding (Brief p. 35). In that case, it was determined that although the Commission must take cognizance of the National Transportation Policy and apply the Act as a whole, the Commission did not act beyond its statutory authority in failing to read two separate sections of the Act as one.

The Commission is not strait-jacketed as to procedures. In Section 17(3) of the Act, Congress provided only that the Commission shall conduct the proceeding under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

While it is the Commission's policy to determine all issues in one proceeding, if those issues are properly raised, *Mississippi Railroad Commission* v. *Alabama & V. Ry. Co.*, 120 I.C.C. 569, 573 (1927)[18], issues under other sections of the Act in this case were not properly raised by appellants.

Briefs of appellants and the United States refer to the petitions for suspension and the protests to the granting of the temporary fourth section order as pleadings which raised issues under other sections of the Act. However, those petitions and protests were denied by the Commission (R. 87, 88, 90, 92) those petitions were not the subject matter of the hearing. The only matter set for hearing was the fourth section application which raised issues only under Section 4 of the Act.

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[18] *Mississippi Railroad Company* v. *Alabama & V. Ry. Co., supra,* quoted by the United States (Brief p. 20) in which the Commission did not decide the fourth section issues in deciding other issues that were raised by complaint filed under Section 13(1) of the Act because the railroads were not ready to proceed reinforces appellees argument that the Commission only decides issues presented by the order or complaint that is the basis of the hearing.

The Commission on four separate occasions prior to hearing advised Mechling and the Board of Trade of their right to file a complaint in which they could raise all issues of lawfulness. The first advice was given on August 26, 1957, in the Commission's notice of the action of its Board of Suspension in concluding not to suspend the involved rates and institute an investigation into their lawfulness under Section 15(7) of the Act (R. 87).

Appellants were similarly advised by the language of the Temporary Fourth Section Order No. 18784 entered on August 27, 1957, (R. 87).

Similar advice was given on August 27 and 28, 1957, in the notices of the Commission of the action of the Division 2 of the Commission, the appropriate appellate division, in voting to affirm the action of the Commission's Board of Suspension (R. 90) and it Fourth Section Board (R. 92).

Thus the parties were not only advised of the simple procedural step to be followed if they desired to raise issues other than those under Section 4, but they were on notice from the temporary fourth section order and the Commission's notice of hearing herein (R. 92), that only fourth section issues were presented for consideration.

The hearing before the Commission was first set for December 4, 1957, (R. 92) three months after Mechling and the Board of Trade were advised of their rights and of the procedural steps that should be taken to implement them. Plaintiffs could have filed a complaint and the Commission would have set it for hearing with the fourth section application; *Mississippi Railroad Commission* v. *Alabama & V. Ry. Co., supra*. No delay would have resulted. The filing of a complaint under the Commission's Rules of Practice

[49 C.F.R. 1.26 *et seq.*] would have been a simple matter for Mechling and the Board of Trade who had already asserted alleged violations of the Act in their request for suspension of the rates. Thus no burdensome procedural problems were presented. This is not a matter of procedural importance in connection with the administration of the Interstate Commerce Act.

Appellants, apparently ignoring the fact that prior to the hearing they were advised by four separate orders that they should file complaints as to the lawfulness of the rates under Section 13(1) of the Act, argue that prior Commission decisions indicate that this was unnecessary. Based on that assumption, the argument is then made that the change in the Commission's procedures here was unfair.

However, this appellee submits that it reasonably relied on the assmption that the Commission orders were meaningful and that the order setting the hearing on the fourth section application raised issues under Section 4 only in view of the Commission's notices that other issues would be determined in complaint proceedings. It is submitted that it would be unfair to subject this appellee to severe injury through a forced return to a noncompetitive status because of appellants' continuous failure to file complaints.

The cases cited by Mechling (Brief p. 34), The Board of Trade (Brief pp. 26-27, Appendix B), and the United States (Brief pp. 21-22), do not indicate a well entrenched practice to treat Section 4 proceedings as though they were general investigations. Almost all of the cases fail since they were (a) not fourth section proceedings;[19] or (b) general investigation proceedings under Section 15(7) of the Act

[19] *City of Spokane* v. *Northern Pacific Ry. Co.*, 21 I.C.C. 400, 426 (1911).

where the lawfulness of the rates are in issue;[20] or (c) cases in which the relief sought was granted;[21] or (d) where a "special case" was found not to exist since discrimination would result at intermediate points;[22] or (e) where the rates were found to be noncompensatory.[23]

Moreover, the Commission's practice not to make final determination under the other sections of the Act has been stated in all fourth section orders issued since *Intermountain Rate Cases, supra*, in 1914.

To find the Commission's order here to be invalid because the Commission did not convert its hearing under Section 4 into a general investigation of the rate structure under all sections of the Act would effectively straight-jacket Commission procedures.

2. The Commission's Report and Order are in Full Accord with the National Transportation Policy.

In the execution of its power to grant partial, conditional

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[20] *Crude Barytes Ore from Missouri to Corpus Christie and Houston*, 295 I.C.C. 505, 508 (1956); *Passenger Fares, Hell Gate Bridge Route, New York, N. Y.*, 296 I.C.C. 147, 153 (1955); *Iron and Steel from Minnequa to Kansas, Nebraska and South Dakota*, 278 I.C.C. 163, 168-169 (1950).

[21] *Intermountain Rate Cases*, 234 U. S. 476 (1914); *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564-565 (1959); *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376-377 (1953); *Lumber from the South and Southwest*, 245 I.C.C. 67, 73-74 (1951); *Commodity Rates on Lumber and Other Forest Products, in Carloads, From South Pacific Coast Territory to Points in Central Freight Association Territory*, 165 I.C.C. 561, 569 (1930); *Differential Routes to Central Territory*, 211 I.C.C. 403, 421 (1935); *Railroad Commission of Nevada* v. *S. P. Co.*, 21 I.C.C. 329, 338-339 (1911).

[22] *Sand and Gravel to Northfield and Evanston, Ill.* 234 I.C.C. 65 (1939); *Pig Iron to Butler, Pa.*, 222 I.C.C. 1 (1937); *Bituminous Fine Coal to LaCrosse, Wis.*, 311 I.C.C. 257 (1960).

[23] *Transcontinental Cases of 1922*, 74 I.C.C. 48 (1922).

relief from the prohibition of charging more for longer than shorter hauls contained in Section 4(1) of the Act, as in the administration of all other sections of the Act, the Commission must be guided by the National Transportation Policy. That it did so before entering the fourth section order under review by this Court is evidenced by the numerous, detailed findings of evidentiary and ultimate facts contained in the Commission's Report.

For example, among other things the National Transportation Policy directs the Commission to:

> "* * * promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation * * * "

In this regard the Commission found that the operating distance of the New York Central from Kankakee Belt origins to Kankakee is approximately one-half the rail distance from Chicago to Kankakee; that origin switching operations at Chicago are more complex than at Kankakee; that no additional trains or power units were needed to handle the additional corn traffic from Belt origins to Kankakee, and that the barge-rail route to Kankakee was from 133 to 797 percent more distant than the direct rail route (R. 23-24).

It also found that:

> "It is clear that the competitive situation which prevailed prior to the proposed rate between the all-rail and the barge-rail rates on corn from the northern Illinois territory to the East required an adjustment in the all-rail rates, and that such an adjustment requires fourth-section relief" (R. 27).

The preexisting "competitive situation" was the virtual monopoly of the less efficient barge-rail routes. Thus, the

fourth section departure rates promote economical and efficient service and are, as the Commission expressly found, "in the public interest".

In the course of its administrative functions, the Commission must also recognize and preserve the "inherent advantages" of each of the various modes of transportation. However, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage. See, *I.C.C. v. New York, N. H. & H. R. Co.*, 372 U.S. 744, 760, footnote 12. (1962)

Because corn is a homogeneous commodity which loses all identity when stored in bulk, it is impossible to say that Kankakee Belt corn barged to Chicago and elevated there with other corn is the identical corn purchased by a processor at Kankakee on the Chicago market and shipped by rail to Kankakee for movement beyond. It is clear from the Commission's findings, however, that the Belt corn which moved directly by rail to Kankakee after the effectivenesses of the fourth section rates displaced corn that would have moved by barge to Chicago. The processors at Kankakee and points south thereof, who were the principal users of those rates, previously purchased equivalent amounts of corn on the Chicago market for rail movement to Kankakee and points south, thence to eastern destinations as corn products (Exhibit 14). Thus, the Belt corn moving direct to Kankakee by rail, displaced corn that would have moved by barge-rail to Kankakee via Chicago.

As the fourth section rates apply only on movements to Eastern destinations, it follows that the competitive modes of transportation are barge-rail via Chicago to Kankakee, thence east, versus all-rail to Kankakee, thence east. The

rail movements beyond Kankakee would entail identical transportation services. Logically then, in order to evalnate the inherent advantages of the competing modes of transportation, the cost of providing barge-rail service to Kankakee must be compared to the cost of providing all rail service to Kankakee.

Appellant Mechling, who asked the Commission to protect a claimed inherent advantage, thus had the burden of showing that the cost of providing barge-rail service to Kankakee was less than that over direct rail route. Its presentation was fatally defective in that it offered only evidence of the barge portion of that service.[24]

Because of the numerous additional expenses incurred in the rail movement of ex barge corn from Chicago to Kankakee over and above that required to move directly by rail to Kankakee it would have been impossible for Mechling to prove any inherent advantage of the barge-rail route. It

[24] The Commission attempted to obtain an explanation of this fundamental deficiency from barge line's counsel at oral argument but was not given a responsive answer:

"Commr.Hutchinson: That is where the difficulty comes, is it, or not, that that cost, operating cost figure, doesn't cover as much service as the cost figure on the other side covers, is that it?

"Mr. Legg: I would say it covers probably as much service but there are a lot more services to handle barge corn than there are to handle rail corn.

"Commr. McPherson: The question is, overall, who is the low-cost carrier?

"Mr. Legg: I think probably we still are, but then it would be a very close case, if you took that view. I think you should take the view, though, that if we can provide a low-cost service of transportation, then whatever services are incurred by the shipper beyond that, we have to take care of on a competitive basis. But they won't be incurred by the shipper if we cease to be low-cost by as much as we are now." (R. 836).

is fairly obvious that the direct route would be the low cost means of transportation.

Finally, the Commission found that the fourth section rates do not constitute a destructive competitive practice. This conclusion is supported by the lack of any inherent cost advantage over the competitive barge-rail route.

It is also supported by the Commission's findings that the fourth section rates are no lower than necessary to meet the competition of the barge-rail rates which is in turn based on subsidiary findings (see pp. 8-11 supra).

How can one argue that this limited reduction of an absolute monopoly amounts to destruction of competition? Mechling increased its rates a year after the competition's rail combination rates became effective (R. 301). Mechling was undoubtedly aware of the anomaly of its position and studiously avoided any reliance on the National Transportation Policy except to the extent of a claimed inherent advantage, the speciousness of which has been demonstrated.

The argument of the United States on the destructive competition issue also ignores the small portion of total available traffic attracted by the direct rail route after the effectiveness of the fourth section rates. Instead, it relies upon two mistaken assumptions of fact.

First, it accepts Mechling's contention that the barge-rail route has an inherent cost advantage. The invalidity of that assumption has been demonstrated.

Secondly, it accepts Mechling's evidence that the proportional rate to Kankakee is non-compensatory despite the Commission's rejection of "unsifted averages" such as

those condemned in *I.C.C.* v. *Mechling*, 330 U.S. 567, 583, and chooses to ignore the numerous factual findings of the Commission concerning the efficiency of operations over the Belt line to Kankakee, the avoidance of costly switching operations at Chicago and the net revenue gain to applicant railroads which results from the reduction of operating expenses and the increase in revenue received. Thus it would substitute its judgment for that of the Commission on an issue which this Court has expressly stated "should be left for initial resolution to the Commission's informed judgment", *I.C.C.* v. *N.Y. N.H. & H. R. Co.*, 372 U.S. 744, 761 (1946). Futhermore, its entire argument on this issue ignores the fact that the proportional rate to Kankakee only applies on transportation to more distant points and has no independent existence, that it is merely a device which permits efficient computation of through transportation charges, and that no shipper is ever assessed the proportional rate directly as is the case with the barge rates.

The Commission, the body created by Congress to deal with such technicalities of publication, determined that the fourth section departure rates could have been published as one-factor through rates as easily as combination through rates and concluded that the condemnation of the rates merely because of the form they took in a tariff would be an exercise in futility. Absent some compelling reason not yet urged by any party to these proceedings, the Commission's judgment on such an issue should be entitled to acceptance by this Court.

V.

CONCLUSION.

The unanimous judgment of the Statutory Three Judge District court dismissing the complaint against the Commission's order should be affirmed.

Respectfully submitted,

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Dated January 17, 1964

PROOF OF SERVICE.

I, RICHARD J. MURPHY, Attorney for Appellee, The New York Central Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of January, 1964, I served copies of the foregoing Brief For Appellee The New York Central Railroad Company on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, as follows:

1. On the Appellant, Board of Trade of the City of Chicago, copies to its attorneys Harold E. Spencer, Esq., and Richard M. Freeman, Esq., One North LaSalle Street, Chicago 2, Illinois.

2. On the Appellants, A. L. Mechling Barge Lines, Inc., Ira Bookwalter, Cullom Cooperative Grain Com-

pany, Charles Treasure, Griswold Grain Company, and Mazon Farmers Elevator, copies to their attorneys Edward B. Hayes, Esq., and Wilbur S. Legg, Esq., 135 South LaSalle Street, Chicago 3, Illinois.

3. On the Appellee, United States of America, copies to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and to James P. O'Brien, Esq., United States Attorney for the Northern District of Illinois, Room 450 United States Court House, Chicago, Illinois.

4. On Appellee Interstate Commerce Commission, copies to Robert W. Ginnane, Esq., its General Counsel and H. Neil Garson, Esq., its Associate General Counsel, Washington 25, D. C.

5. On Appellees, Farmers Cooperative Elevator Company, Federal North Iowa Grain Company, Milla Grain & Supply Company, Union Hill Farmers Elevator, Neilsen Grain Company, Ferris Grain Company, Frank Gibbons Grain Company, Cahill Grain Company, Diemer Grain Company, Priscilla Grain Company, McNabb Grain Company, Missal Farmers Grain Company, Payne-Stotler Grain Company, Lostant Grain Company and Isaac Barrett Grain Company, and copies to their attorney, Leo P. Day, Esq., 6202 South Campbell Avenue, Chicago, Illinois.

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